IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.451 OF 2007

National Organic Chemical)
Industries Limited, a Company)
incorporated under the Companies)
Act, 1956, having its registered)
office at Mafatlal House)
H.T. Parekh Marg, Backbay)
Reclamation, Churchgate)
Mumbai 4000020) .. Petitioner.

Vs

1. State of Maharashtra)
2. Mr Bhaskar Mendon,)
3. Mr. Sure Rane,)
4. Mr. Subhash Prabhu)
5.Mr. Jagdish Shetty)
6.Mr. Shekhar Kundar)
7. Mr. Shantaram Bhinge)
8.Mr. Balkrishna Bhinde)
c/o Mahesh B Pabane)
501, Sir Vithaldas Chambers)
16, Bombay Samachar Marg)
Fort, Mumbai 400023)
9.M/s Sadanand Caterers)
Catering Contractors having)
its address at B-10-17, 1st floor)
Room No.4, C.B.D.Belapur)
Konkan Bhavan,)
New Bombay 400708)
10.Shri K. R. Itolikar)
Presiding Officer)
First Labour Court)
PWD Building Bandra(E))
Mumbai 400051)…..… Respondents

Mr K.R. Pai with Mr.J.P.Cama i/b M/s Sanjay Udeshi & Co
for the petitioner.
Mr. P.M. Mokashi, AGP for respondent No.1.
M. M.B.Pahane for respondent Nos.2 to 8.

CORAM: **SWATANTER KUMAR, C.J., &**
S.R.SATHE, J.

Judgment reserved on 3rd April 2007
Judgment delivered on 19th April 2007.

JUDGMENT(PER SWATANTER KUMAR, C.J.):

Heard the learned counsel for the parties.

1. The Government of Maharashtra in exercise of its powers vested by virtue of section 39 of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act") notified that powers exercisable by it under sub-section (1) of section 10 and sub-section (5) of section 12 of the Act shall, in relation to the Industrial Disputes Act, relating to disputes specified in the schedule, be exercised also by the Deputy Commissioner of Labour (Conciliation), Mumbai District Office, Mumbai. In exercise of his powers the said officer, vide his order of reference dated 20th July 2006 referred the alleged dispute between the petitioner and its workmen for determination to the Labour Court, Mumbai. The relevant part of the order of reference reads as under:

> "Now, therefore, in exercise of the powers conferred by clauses (d) of sub-section (1) of section 10 and with section 12(5) of the

Industrial Disputes Act, 1947 as delegated in the manner aforesaid, the Deputy Commissioner of Labour (Conciliation), Mumbai District Office, Mumbai is pleased to make a reference of the said dispute for adjudication of the Labour 1st Court, at Mumbai consisting of Shri K.R. Itolikar, Presiding Officer, constituted under Government Notification Industries, Energy and Labour Department No IDA-2004/5/3871/LAB-3 dated 28.5.2004.

S C H E D U L E

Shri Bhaskar Mendon and 6 others as per Schedule should be reinstated with full back wages and other consequential benefits as are applicable to permanent staff of the company and continuity of service w.e.f. 1.11.2001.

sd/-
(A.P.Joshi)
Deputy Commissioner of Labour (Conc) Mumbai District, Mumbai."

The legality and correctness of the above order is questioned by the petitioner by means of the present petition under Article 226 of the Constitution of India, primarily on the following grounds, and it prays for quashing of reference at the very threshold:

(a) The respondent authority exceeded its jurisdiction in referring the dispute raised by respondent Nos.2 to 8 for adjudication under section 10(1) of the Act without primarily determining whether there existed relationship of employer-employee. The respondents were, if at all employees of the canteen contractor, consequences of their

employment in relation to conditions of their services would not be fastened upon the petitioner.

(b) It was a clear case of absence of an industrial dispute as contemplated under section 2(k) of the Act. The employees of the Petrochemical and Polymer Division including the employees with the head office were ceased to be the employees by their acceptance of voluntary retirement on account of closure notice dated 3rd June 2002. Thus the appropriate Government had no jurisdiction to make any reference;

(c) There was no prima facie material to establish the privity of contract between the parties, the workmen had no locus standi to raise the industrial dispute and the reference, in any case, is contrary to the settled principles of law and is liable to be quashed at the very threshold.

2. In order to examine the merit or otherwise of these contentions, now we may refer to the facts giving rise to the present writ petition. The petitioner is a limited company registered under the Companies Act, 1956

and as per its case, was involved in manufacturing of petrochemicals and polymer. On 3rd June 2002, a notice was issued by the company seeking permission under section 25(O) of the Act for closure of its petrochemicals and polymer undertaking permanently and also sought permission to terminate the services of all its workmen employed in that division totaling about 580. The Commissioner of Labour, Mumbai, vide his order dated 20th March 2003 granted permission to close down the undertaking. However, later on, the order was referred for review to the Industrial Tribunal, Thane. This division of the company came to be demerged and hived off from the petitioner under a scheme of arrangement as per the order of this court passed in Company Petition No. 104 of 2005 along with Company Application No.446 of 2005 on 8th June 2005. The contract for catering service, which was awarded to M/s Sadanand Caterers was terminated by them on 2nd March 1998. Respondent Nos. 2 to 8 workmen were the employees of M/s Sadanand Caterers. The workmen filed a complaint before the Industrial Court, Mumbai against the petitioner company for their absorption, while another complaint was filed being Complaint (ULP) No. 622 of 1998 before the Industrial Court, Mumbai, inter alia challenging their termination of services by the contractor. Vide order dated 6th September 1999, the complaint was decided in favour of the workmen. This order was

challenged by the petitioner company by filing writ petition being Writ Petition No.2648 of 1999 before this court, which was allowed vide order dated 10th September 2001. Aggrieved by that order the workmen had filed an appeal bearing Letters Patent Appeal No.1202 of 2001, which was dismissed, whereafter on 30th December 2004, the workmen raised a demand against the petitioner company demanding their absorption. This demand was opposed by the company vide their letter dated 19th April 2005. The matter was taken upto the Deputy Commissioner of Labour, Mumbai, where the workmen filed justification statement. The company filed reply. The workmen also issued notice to the contractor M/s Sadanand Caterers for reinstatement of the workmen. The Commissioner of Labour and Conciliation Officer vide his order dated 14th December 2005 submitted a failure report resulting in passing of an order of reference dated 20th July 2006 by the appropriate Government. The proceedings were taken by the Presiding Officer, 1st Labour Court and the reference was numbered as IDA No.382 of 2006 where the respondent-workmen have filed their statement of claim. The petitioner company filed its written statement and the matter is stated to be listed for recording evidence. At this stage the company filed the present writ petition on 27th February 2007.

3. In terms of the reply affidavit filed on behalf of the respondent-workmen, it is stated that the present writ petition is not maintainable. The order of reference was passed on 20th July 2006 and the pleadings have been completed. Now the matter is fixed for recording of evidence and the present petition is an abuse of process of the court. The averments with regard to the filing of the complaints and the orders of the courts are not in dispute. In the order allowing the complaints partly the authority had directed the petitioner company not to pass transfer orders/termination orders and respondents were directed to return the retrenchment compensation. They were also directed to designate post and pay scale in consultation with the recognised union in regard to the National Organic Chemicals Limited within the stipulated time.

4. While relying upon the judgment of the Supreme Court in the case of Cipla Limited vs Maharashtra Kamgar General Union and ors, reported in 2001 (1) CLR 754, it is argued that they are the employees of the petitioner company and any contract between the petitioner company and the contractor is a sham and camouflage transaction and also offends the provisions of the Contract Labour (Regulation and Abolition) Act. According to the workmen, they were working with the petitioner company right from

the year 1992. The contractor came on the scene only in the year 1997, the contractor used to supply snacks, which are prepared outside whereas all the work within the premises of the canteen of the petitioner company was being done by the respondent-workmen. They claim to be the workmen of the petitioner company and have direct relationship in fact and in law. After merger into the NOCIL, the factory outside Mumbai and the administrative office at Nariman Point were being maintained where the respondent-workmen were employed. On February 18, 1996 as a result of fraudulent and illegal act, the contractor was brought into the picture and respondent-workmen were directed to leave the premises. According to the workmen the reference is valid. There is apparent findings recorded, prima facie establishing relationship of employer-employee and existence of industrial dispute. In these circumstances they prayed for dismissal of the petition.

5. Having stated the factual metrixs of the case we will prefer to examine the law in relation to the ambit and scope of section 10(1) of the Act and the limitations of judicial review in relation to an order of reference referring an industrial dispute to the Labour Court. In the case of Shri Subhash Chand vs Government of NCT and Anr, reported in 117(2005) DLT 527, a Division Bench of the Delhi High Court had an occasion to discuss, in some

elaboration, the law on the subject. The court has held as under:

> "Reference to the development of law in this regard is necessitated for the reason that somewhat divergent views have been expressed by the Courts while explaining the scope and limitations of jurisdiction vested in the appropriate Government while exercising its administrative power of making a reference under Section 10(1)(c) of the Act.

6. Reference to the decision of the Constitutional Bench of the Supreme Court in the case of State of Madras v. C.P. Sarathy, 1953 SCR 334 can be usefully made at the very outset. It was observed:

> "But, it must be remembered that in making a reference under section 10(1) the Government is doing an administrative act and the fact that it has to form an opinion as to the factual existence of an industrial dispute as a preliminary step to the discharge of its function does not make it anytheless administrative in character. The Court cannot, therefore, canvass the order of reference closely to see if there was any material before the Government to support its conclusion, as if it was a judicial or quasi-judicial determination.

7. Explaining the ratio of the decision in Sarathy's case (supra), in Western India Match Co. Ltd. v. Western India Match Co. Workers Union, MANU/SC/0375/1970 it was observed as under :

> "In the State of Madras v. C.P. Sarathy, this Court held on construction of Section 10(1) of the Central Act that the function of the appropriate Government thereunder is an administrative functions. It was so held presumably because the Government cannot go into the merits of the

> dispute its function being only to refer such a dispute for adjudication so that the industrial relations between the employer and his employees may not continue to remain disturbed and the dispute may be resolved through a judicial process as speedily as possible."

8. After referring to the earlier decisions on the subject in "Shambhu Nath Goyal v. Bank of Baroda, Jullundur, MANU/SC/0283/1978 it was held that "in making a reference under section 10(1), the appropriate Government is doing an administrative act and the fact that it has to form an opinion as to the factual existence of an industrial dispute as a preliminary step to the discharge of its function does not make it any the less administrative in character." Thus, there is a considerable body of judicial opinion that while exercising power of making a reference under Section 10(1), the appropriate Government performs an administrative act and not a judicial or quasi-judicial act."

9. The scope and scheme of Sections 10 and 12 of the Act were also examined by the Supreme Court in State of Bombay v. K.P. Krishnan and Ors., MANU/SC/0199/1960. It was held therein as under :

> "Even if the appropriate Government may be acting under section 12(5) by itself and independently of Section 10(1) does not confer power on the appropriate Government to

> make a reference. While deciding whether a reference should be made under section 12(5) it would be open to the appropriat Government to consider, besides the report of the Conciliation Officers other relevant facts which may come to its knowledge or which may be brought to its notice. Just as discretion conferred on the Government under section 10(1) can be exercised by it in dealing with industrial disputes in regard to non-public utility services even when Government is acting under Section 12(5), so too the provisions of the second proviso to Section 10(1) can be pressed into service by the Government when it deals with an industrial dispute in regard to a public utility service under Section 12(5)."

10. It was further held by the Supreme Court that "whether Section 12(5) is construed as making it obligatory on the Government to make a reference when it is satisfied that there is a case for reference or as only conferring a discretion, if in refusing to make a reference Government is influenced by reasons which are wholly extraneous or irrelevant or which are not germane, then its decision may be open to challenge in a court of law. Though considerations of expediency cannot be excluded when Government considers whether or not it should exercise its power to make a reference it would not be open to the Government to introduce and rely upon wholly irrelevant or extraneous considerations under the guise of expediency."

11. Again in Bombay Union of Journalists and Ors. v. The State of Bombay and Anr., MANU/SC/0135/1963, which has been relied upon by

both the parties, the relevant scheme of the Act as disclosed by Section 12 viz.-a-viz. the powers of the appropriate Government under Section 10 was discussed. It was held therein as under :

> "When the appropriate Government considers the question as to whether a reference should be made under section 12(5), it has to act under section 10(1) of the Act, and Section 10(1) confers discretion on the appropriate Government either to refer the dispute, or not to refer it, for industrial adjudication according as it is of the opinion that it is expedient to do so or not. In other words, in dealing with an industrial dispute in respect of which a failure report has been submitted under Section 12(4), the appropriate Government ultimately exercises its power under section 10(1), subjects to this that Section 12(5) imposes an obligation on it to record reasons for not making the reference, when the dispute has gone through conciliation and a failure report has been made under Section 12(4)."

12 However, it was further held by the Supreme Court which also needs re-production and it is re-produced hereunder :

> "But it would not be possible to accept the plea that the appropriate Government is precluded from considering even prima facie the merits of the dispute when it decides the question as to whether its power to make a reference should be exercised under section 10(1) read with Section 12(5), or not. If the claim made is patently frivolous, or is clearly belated, the appropriate Government my refuse to make a reference. Likewise, if the impact of the claim on the general relations between the employer and the employees in the region is likely to be adverse, the appropriate Government may take that into account in deciding whether a reference should be

> made or not. It must, therefore, be held that a prima facie examination of the merits cannot be said to be foreign to the enquiry which the appropriate Government is entitled to make in dealing with a dispute under section 10(1)."

13 A reference to a Supreme Court ruling in The M.P. Irrigation Karamchari Sangh v. State of M.P. and Anr., MANU/SC/0221/1985 is also very much relevant. In an appeal before the Supreme Court it was contended that the High Court had failed to properly delineate the jurisdiction of the Government under Section 10 read with Section 12(5) of the Act. It was contended before the Supreme Court that question raised by the appellant had to be decided by the Tribunal on evidence to be adduced before it and it could not be decided by the Government on a prima facie examination of the facts of the case. This submission was met with the plea that the Government had in appropriate cases at least a limited jurisdiction to consider on a prima facie examination of the merits of the demands, whether they merited a reference or not.

14. After considering the rival contentions of the parties the Hon'ble Supreme Court observed as under :

> ".....But it would not be possible to accept the plea that the appropriate Government is precluded from considering even prima facie the merits of the dispute when it decides the question as to whether its power to make a reference should be exercised under Section 10 (1) read with Section 12(5) or not. If the claim made is

> patently frivolous, or is clearly belated, the appropriate Government may refuse to make a reference. Likewise, if the impact of the claim on the general relations between the employer and the employees in the region is likely to be adverse, the appropriate Government may take that into account in deciding whether a reference should be made or not."

15. It was then held by the Supreme Court as under :

> "We find that the approach made by the High Court has wrong and the reliance on the above passage on the facts of this case, is misplaced and unsupportable. This Court had made it clear in the same Judgment in the sentence preceding the passage quoted above that it was the province of the Industrial Tribunal to decide the disputed questions of fact."
> ".....Similarly, on disputed questions of fact, the appropriate Government cannot purport to reach final conclusions, for that again would be the province of the Industrial Tribunal....."

16. It was then finally held by the Supreme Court as under :

> "While conceding a very limited jurisdiction to the State Government to examine patent frivolousness of the demands, it is to be understood as a rule, that adjudication of demands made by workmen should be left to the Tribunal to decide. Section 10 permits appropriate Government to determine whether dispute "exists or is apprehended" and then refer it for adjudication on merits. The "demarcated functions are (1) reference; (2) adjudication. When a reference is rejected on the specious plea that the Government cannot bear the additional burden, it constitutes adjudication and thereby usurption of the power of quasi-judicial Tribunal by an Administrative authority, namely, the Appropriate Government. There may be exceptional cases in which the State Government may, on a proper examination of the demand come to a conclusion that the

> demands are either perverse or frivolous and do not merit a reference. Government should be very slow to attempt an examination of the demand with a view to decline reference and Courts will always be vigilant whenever the government attempts to usurp the powers of the Tribunal for adjudication of valid disputes. To allow the Government to do so would be to render Sections 10 and 12(5) of the Industrial Disputes Act nugatory."

17 The observations of the Supreme Court in Ram Avtar Sharma and Ors. v. State of Haryana and Anr., MANU/SC/0228/1985 that making or refusing to make a reference under section 10(1), the Government cannot dwelve into the merits of the dispute also needs attention. The relevant portion of the judgment reads as under :

> "Now if the Government performs an administrative act while either making or refusing to make a reference under Section 10(1), it cannot delve into the merits of the dispute and take upon itself the determination of lis. "That would certainly be in excess of the power conferred by Section 10. Section 10 requires the appropriate Government to be satisfied that an industrial dispute exits or is apprehended. This may permit the appropriate Government to determine prima facie whether an industrial dispute exits or the claim is frivolous or bogus or put forth for extraneous and irrelevant reasons not for justice or industrial peace and harmony. Every Administrative determination must be based on grounds relevant and germane to the exercise of power. If the administrative determination is based on grounds irrelevant, extraneous or not germane to the exercise of power it is liable to be questioned in exercise of the power of judicial review."

18 The judgment of the Supreme Court in Workmen of Syndicate Bank, Madras v. Government of India and Anr., MANU/SC/0214/1984, is also very much relevant for throwing light on the powers of the Government under section 10 of the Act. The relevant portion is re-produced hereunder :

> "We are of the view that the ground on which the Government of India has refused to refer the dispute relating to the imposition of punishment of stoppage of three increments of Shri Murugavelu to the Industrial Tribunal is not a valid ground. It would not be right for the Government of India to refuse to make the reference on the ground that the charges of misconduct against the worker were proved during a duly constituted departmental enquiry and penalty was imposed on the worker after following the required procedure. If such a ground were permissible it would be the easiest thing for the management to avoid a reference to adjudication and to deprive the worker of the opportunity of having the dispute referred for adjudication even if the order holding the charges of misconduct proved was unreasonable or perverse or was actuated by mala fides or even if the penalty imposed on the worker was totally disproportionate to the offence said to have been proved. The management has simply to show that it has held a proper inquiry after complying with the requisite procedure and that would be enough to defeat the worker' sclaim for adjudication. Such a situation cannot be countenanced by law. We must, therefore, set aside the order dated 2.4.1981 passed by the Government of India declining to make a reference of the industrial dispute for adjudication to the industrial Tribunal."

19 Again the observations of the Supreme Court in Telco Convoy Drivers Mazdoor Sangh and Anr. v. State of Bihar and Ors., MANU/SC/0605/1989, which are relevant for the proposition under consideration are re-produced

as under :

> "While exercising power under Section 10(1) the function of the appropriate Government is an administrative function and not a judicial or quasi judicial function, and that in performing this administrative function the Government cannot delve into the merits of the dispute and take upon itself the determination of the lis, which would certainly be in excess of the power conferred on it by Section 10. It is true that in considering the question of making a reference under section 10(1), the Government is entitled to form an opinion as to whether an industrial dispute "exists or is apprehended" is not the same thing as to adjudicate the dispute itself on its merits."

20. Reading the above judgments of the highest Court of the land shows that provisions of Section 10 of the Act were construed not quite liberally. The jurisdiction of the State Government was stated to be an administrative function and not a judicial or quasi judicial function. Formation of an opinion under Section 10(1) of the Act was relatable to whether an industrial dispute existed or is apprehended. It was not the same thing as to adjudicate the dispute itself on merits' In other words, the appropriate Government was not competent to travel beyond the limits of forming a prima facie opinion with regard to existence of the dispute or that an industrial dispute was apprehended. The Government was not competent to directly or indirectly determine the merits of the dispute. Formation of an opinion without

encroaching upon the domain of adjudication was the essence of powers vested under Section 10(1) of the Act.

21. The Industrial Law, developed as a result of subsequent amendments to the Act as well as by judicial pronouncements by different Courts, is having far reaching effects on the various facets of this law. Section 11(a) was incorporated in the Act by Section 3 of the Industrial Disputes Amendment Act, 1971 with effect from 15th December, 1971. The purpose of this amendment was primarily to enlarge the scope of the adjudication process before the Industrial Court or Tribunal and vest powers of wider magnitude in the Courts. The basic intent was to prevent the unfair labour practice by the Management and to ensure that the workman was not subjected to victimisation. This Section really did not effect the power of the Government under Section 10(1) of the Act in relation to refer or not to refer an industrial dispute to the Labour Court or Tribunal in exercise of its administrative power. One obvious conclusion of this amendment is that a workman can also claim a reference even with regard to the quantum of punishment even in a case of proven misconduct. He could raise an issue that the punishment inflicted upon him was ex-facie disproportionate to the

gravity of the misconduct. The Government would have hardly any jurisdiction to decline a reference even of this kind within the purview and scope of the provisions of Section 10 of the Act. A Division Bench of Punjab and Haryana High Court in Ramphal v. State of Haryana, 1995 (4) SLR 184 took this view which was subsequently followed in various judgments including the Full Bench of that Court in the case of Radhey Shyam v. State of Haryana, 1997 (6) SLR 1.

22 Section 2(a) was inserted in this Act by Amendment Act 35 of 1965 which was effective from 1.12.1965 with a clear legislative mandate to enable an individual workman to raise an industrial dispute in relation to and in the event he had been discharged, dismissed, retrenched or his services were otherwise terminated by his employer. The espousing of a cause of the workman by a Union to this particular class of cases was not mandatory. These developments would have definite impact on the scheme of this Act. Particularly, the appropriate Government is expected to be alive to the situation that the law framers have imposed an obligation upon them to consider the question of reference of an industrial dispute to the Labour Court/Industrial Tribunal effectively, meaningfully and to ensure that the

unfair practices or victimisation was not permitted to prevail. The discretion of the appropriate Government under Section 10 is of wide magnitude but it must be exercised in consonance with the provisions of the Act as interpreted by judicial pronouncements. Limitations on exercise of such jurisdiction are inbuilt in various Sections of the Act and particularly Section 2 (a), 11(a) and 22 of the Act. The wide discretion vested in the appropriate Government has to be exercised in a manner so as to keep an equilibrium between industrial harmony without hampering the industrial progress of the country. To make a reference or to deny the same either way must be forming of an opinion based upon some kind of plausible reasoning. The power whether administrative or in furtherance to legislative provisions, cannot be exercised arbitrarily and the process of decision making is entirely based upon the reasoning and fairness. The Full Bench in the case of Radhey Shyam (Supra) while answering the question raised whether the appropriate Government is entitled to examine the merits of the case while forming an opinion in relation to existence or apprehension of an industrial dispute and its extent, answered upon discussion as under :

> "After going through the statutory provisions and the various decisions of the Supreme Court as well as the High Courts, our answer to the fourth proposition is that by insertion of Section 11A in the Act only the powers of the Labour Courts/Tribunals have been enlarged.

Insertion of Section 11A has not taken away the powers of the appropriate Government to refer or not to refer an industrial dispute to the Labour Court or the Tribunals, as the case may be, of course, subject to the limitations imposed by the law as laid down by the authoritative pronouncements of Supreme Court. Section 11 comes to play only after the industrial dispute is referred to the Labour Court, Tribunal or National Tribunal or the appropriate Government for adjudication.

In view of our discussion made above, no doubt is left that the observations of the Supreme Court in Bombay Union of Journalists v. State of Bombay (Supra) that the appropriate Government can consider prima facie on the merits of the dispute when it decides the question as to whether its power to make a reference should be exercised under section 10(1) read with Section 12(5) are still applicable. The appropriate Government is not precluded from considering the prima facie merits of the dispute and to refuse to refer the dispute under section 10 read with Section 12(5), if the claim made is patently frivolous is clearly belated even after the insertion of Section 2A and 11A in the Act.

After reading Sections 10 and 12 together, in our view, it is incumbent upon the Government to record and communicate to the parties concerned its reasons for refusing to make a reference. It has been provided in Section 12(5) itself that where the appropriate Government does not make a reference, it shall record and communicate its reasons to the parties concerned. Even otherwise, for refusing to refer any dispute under section 10 it is necessary for the Government to give reasons for refusing to refer the industrial dispute to the Labour Court or the Tribunals on the principles of natural justice. The Government is required to pass a speaking order when refusing to refer the dispute to the Labour Court or the Tribunals as the case may be so that the party concerned may be able to know the reasons for tis refusal. We, thus, answer this proposition of law, as

referred to above, accordingly.

The cumulative effect of our answers to the above questions can be montaged and concisely summed up to say, that introduction of Section 2(A) read with Section 11(A) as it is on the statute book today, does not materially affect the existing powers of the Government to make a reference under Section 10 of the Industrial Disputes Act within the afore-stated well defined limitations. Thus, the scope of power exerciseable by the appropriate Government falls in a very narrow compass and does not in any way permit it to encroach upon the determination of merits in dispute. The amendment of Section 2(A) only lifts an embargo which earlier existed on an individual workman to have his dispute referred through the competent government for adjudication to a competent forum i.e. Industrial Court or Tribunal etc. The legislative intent behind such amendment appears to be more tilted towards enlarging the scope of a referable dispute by the concerned authority rather than to put any further shakles on the existing power of the Government to make a reference of an industrial dispute under the provisions of this Act. The jurisdiction of the appropriate Government is primarily administrative in its nature and scope. It must restrict its decision with regard to a dispute being non-existence vexatious and/or frivolous. This power extends to declining reference of a dispute in the event of industrial harmony being adversely affected as understood in its larger sense. Industrial harmony cannot be restricted to a dispute of a few workmen with its management in an industry. A section of industrial units should stand effected and fall within the clutches of adversity arising out of such industrial dispute. In other words involvement of larger industrial section treated as a whole would alone result in disturbance of industrial harmony, infringe public utility and larger public interest. The expression ' industrial harmony' must not be understood in its narrow sense so as to frustrate every dispute on the ground that there is likelihood of some clash between the workman of an industry and the

management.

The percept of industrial law with its liberal amendments justifies liberal reference of industrial dispute, more tilted towards recognition and acceptance of dispute of individual workman of the nature prescribed under Section 2(A). The language of the amended provisions of Section 2A read with Section 10 and 11A of the Industrial Disputes Act further substantiates the view taken by us. The concept of deeming dispute and reference of such a dispute to the Industrial Tribunal or Labour Court certainly enlarges the scope of referable disputes with some liberal construction.

On the analysis of the entire matter, our answer to the first question is as hereunder (however, subject to our answer to the other questions) which have been enumerated above.

(1)The appropriate Government can go into the merits of the dispute prima facie for the purpose of finding out whether an industrial dispute exists or is apprehended and whether the Government should make a reference or not.

(2)But in doing so, the appropriate Government cannot delve into the merits of the dispute and take upon itself the determination of the lis.

(3)If the claim is patently frivolous and vexatious then the appropriate Government may refuse to make the reference.

(4)In deciding whether to make a reference or not, the Government may take into consideration whether the impact of the claim on the general relations between the employer and the employees in the regions is likely to be adverse disturbing industrial harmony understood in its larger sense.
(5)While the appropriate Government can examine the patent frivolousness of the demands, it shall not itself

> adjudicate on the demands made by the workman, which should be left to the Labour Court/Tribunal concerned. The Government should be very slow to attempt an examination of the demand with a view to decline the reference".

23. We may notice here that in the above cited judgment, the Full Bench had observed that there is no limitation prescribed under the provisions of the Industrial Disputes Act and as such a workman can raise an industrial dispute at any time. However, it was indicated that a period of 5 years would be a reasonable period whereafter the workman should explain the reasons for longer delay. This particular conclusion of the Full Bench was over-ruled by the Supreme Court in the case of Ajaib Singh v. Sri Hind Co-operative Marketing cum Processing Service Society Limited and Anr., MANU/SC/0254/1999. The judgment of the Supreme Court would have to be examined in the light of the subsequent judgments of the Supreme Court wherein the law stated by the Supreme Court in this case was diluted and in subsequent judgments the Supreme Court clearly stated that even the appropriate Government would have its rights to decline a reference if the dispute was non-existent or was so stale that unexplained and prolonged delay would render the same as one which had extinguished and thus not referable.

24. The appropriate Government would have to apply its mind to certain basic conditions while considering the request of the persons covered under the provisions of this Act for a reference to the Labour Court or Tribunal, as the case may be, under Section 10 of the Act. On the facts averred in the application for a reference it must be determined that there is employer-employee relationship between the parties, the dispute exists or is apprehended between the parties and the demand in that regard has been raised within a reasonable time. These ingredients would have to be seen in the light of conciliation report submitted by the Conciliation Officer to the appropriate Government at the appropriate stage. In the case of Shalimar Works Limited v. Their Workmen, AIR 1959 SC 1216 the Supreme Court introduced the concept of reasonableness in invoking such jurisdiction.

> "It is true that there is no limitation prescribed for reference of disputes to an Industrial Tribunal; even so it is only reasonable that disputes should be referred as soon as possible after they have arisen and after conciliation proceedings have failed, particularly so when disputes relate to discharge of workmen wholesale, as in this case. The industry has to carry on and if for any reason there has been a wholesale discharge of workmen and closure of the industry followed by its reopening and fresh recruitment of labour, it is necessary that a dispute regarding reinstatement of a large number of workmen should be referred for adjudication within a reasonable time. We are of opinion that in this particular case the dispute was not referred for adjudication within a reasonable time as it was sent to the Industrial Tribunal more than four

> years after even re-employment of most of the old workmen. We have also pointed out that it was open to the workmen themselves even individually to apply under S. 33A in this case; but neither that was done by the workmen nor was the matter referred for adjudication within a reasonable time.

25 The ambit and scope of powers vested in the appropriate Government under Section 10 of the Act has been a matter of concern, consistently and at all times. It would be useful to refer to the recent judgments of the Supreme Court in regard to the scope of, as well as effect of delay on the part of the workman in claiming a reference under these provisions.

26. It is clear that the views expressed by the Supreme Court in the case of Bombay Union of Journalist (Supra) was followed in The M.P. Irrigation Karamchari Sangh (Supra) which again was followed in Telco Convoy Drivers Mazdoor Sangh (Supra), and the principles discussed in earlier judgments were specified and it was reiterated with great emphasis that while exercising powers under Section 10(1) of the Act the function of the Government is administrative and not judicial or quasi judicial. It has to primarily determine whether a dispute exists or is apprehended. An exception was also carved on the basis of a domain being perverse and

frivolous. The Courts were expected to be very careful in examining the matter that the Government does not usurp the powers of the Tribunal. Somewhat wider interpretation was given to this jurisdiction by the Supreme Court in the case of Rajasthan STRC and Anr. v. Krishna Kant and Ors., MANU/SC/0786/1995 where the Court held as under :

> " (4) It is not correct to say that the remedies provided by the Industrial Disputes Act are not equally effective for the reason that access to the forum depends upon a reference being made by the appropriate Government. The power to make a reference conferred upon the Government is to be exercised to effectuate the object of the enactment and hence not unguided. The rule is to make a reference unless, of course, the dispute raised is a totally frivolous one ex facie. The power conferred is the power to refer and not the power to decide, though it may be that the Government is entitled to examine whether the dispute is ex facie frivolous, not meriting an adjudication."

27 We have already noticed that in Ajaib Singh' scase (Supra), the Supreme Court held that the Limitation Act does not apply and the view of the Full Bench, in regard to time frame under the Industrial Disputes Act was held to be not correct. It was further held that no reference to the Labour Court could generally be questioned on the ground of delay alone and a reference was held to be sustainable even after lapse of 7 years. Similar view was also taken in Gurmail Singh v. Principal, Govt. College of Education and Ors., 2000 (9) SCC 496.

28 However, subsequently this trend of the judicial pronouncements showed a somewhat divergent view. In the case of The Nedungadi Bank Limited v. K.P. Madhavankutty and Ors., 2000(1) SLR 636, the Supreme Court while dealing with the case of demand raised after a lapse of 7 years held as under:

> " Law does not prescribe any time limit for the appropriate government to exercise its powers under Section 10 of the Act. It is not that this power can be exercised at any point of time and to revive matters which had since been settled. Power is to be exercised reasonably and in a rational manner. There appears to us to be no rational basis on which the Central Government has exercised powers in this case after lapse of about seven years of order dismissing the respondent from service. At the time reference was made no industrial dispute existed or could be even said to have been apprehended. A dispute which is stale could not be the subject-matter of reference under Section 10 of the Act. As to when a dispute can be said to be stale would depend on the facts and circumstances of each case. When the matter has become final, it appears to us to be rather incongruous that the reference be made under Section 10 of the Act in the circumstances like the present one. In fact it could be said that there was no dispute pending at the time when the reference in question was made. The only ground advanced by the respondent was that two other employees who were dismissed from service were reinstated. Under what circumstances they were dismissed and subsequently reinstated is nowhere mentioned. Demand raised by the respondent for raising industrial dispute was ex facie bad and incompetent."

29. This view was followed with approval by the Supreme Court in the case of Assistant Executive Engineer Karnataka v. Shivalinga, MANU/SC/1373/2001 where the Court, after considering the judgments of Ajaib Singh (Supra) and Sapan Kumar Pandit v. U.P. State Electricity Board, 2001 SCC (L&S) 946, stated that the principle could be followed in appropriate cases. In that case the services of the workman were terminated on 25th May, 1985 and he had approached the Labour Officer on 17th March, 1995. The Labour Court found the delay of 9 years fatal and rejected the reference. The High Court interfered with the order which was set aside by the Supreme Court, holding as under :

> " In cases where there is serious dispute, or doubt in such relationship and records of the employer become relevant, the long delay would come in the way of maintenance of the same. In such circumstances to make them available to a Labour Court or the Industrial Tribunal to adjudicate the dispute appropriately will be impossible. A situation of that nature would render the claim to have become stale. That is exactly the situation arising in this case. In that view of the matter, we think the two decisions relied upon by the learned counsel have no application to the case on hand. Proceeding on the facts of the case we think the High Court is wrong in having interfered with the award made by the Tribunal. The order made by the High Court in the writ proceedings, therefore, shall stand set aside and the award made by the Labour Court shall stand restored. The appeal is allowed accordingly."

30. Still in an another case of S.M. Nilajkar and Ors. v. Telecom District Manager, Karnataka, MANU/SC/0261/2003, though the Court granted relief to the workman, it clearly enunciated the principle that delay in making a demand could bring adverse consequences to the case of the workman. The Court held as under :

> "17. It was submitted on behalf of the respondent that on account of delay in raising the dispute by the appellants the High Court was justified in denying relief to the appellants. We cannot agree. It is true, as held in Shalimar Works Ltd. v. Workmen that merely because the Industrial Disputes Act does not provide for a limitation for raising the dispute, it does not mean that the dispute can be raised at any time and without regard to the delay and reasons thereof. There is no limitation prescribed for reference of disputes to an Industrial Tribunal; even so it is only reasonable that the disputes should be referred as soon as possible after they have arisen and after conciliation proceedings have failed, particularly so-when disputes relate to discharge of workmen wholesale. A delay of 4 years in raising the dispute after even re-employment of most of the old workmen was held to be fatal in Shalimar Works Ltd. v. Workmen. In Nedungadi Bank Ltd. v. K.P. Madhavankutty a delay of 7 years was held to be fatal and disentitled the workmen to any relief. In Ratan Chandra Sanmanta v. Union of India it was held that a casual labourer retrenched by the employer deprives himself of remedy available in law by delay itself; lapse of time results in losing the remedy and the right as well. The delay would certainly be fatal if it has resulted in material evidence relevant to adjudication being lost and rendered not available. However, we do not think that the delay in the case at hand has been so culpable as to disentitle the appellants to any relief. Although the High Court has opined that there was a delay of 7 to 9 years in raising the dispute before the Tribunal but we find the

> High Court factually not correct. The employment of the appellants was terminated sometime in 1985-86 or 1986-87. Pursuant to the judgment in Daily Rated Casual Labour v. Union of India the Department was formulating a scheme to accommodate casual labourers and the appellants were justified in awaiting the outcome thereof. On 16-1-1990 they were refused to be accommodated in the Scheme. On 28-12-1990 they initiated the proceedings under the Industrial Disputes Act followed by the conciliation proceedings and then the dispute was referred to the Industrial Tribunal-cum-Labour Court. We do not think that the appellants deserve to be non-suited on the ground of delay."

31. We may also notice here that in Sapan Kumar Pandit's case (Supra), the Supreme Court had taken the view, as taken in Ajaib Singh' scase (Supra) and held that if the dispute remains alive though not galvanised by the workman or the Union on account of other justified reasons it does not cause the dispute to vein into total eclipse. The High Court should not have quashed the reference merely on the ground of long delay for making an adjudication which could be considered by the adjudicating authorities while moulding its reliefs. Their Lordships referred to the earlier view of the Supreme Court in Western India Match Company Ltd. v. Worker Union, MANU/SC/0375/1970.

32. It appears to be a settled principle of law that while the appropriate

Government is exercising its power to make a reference under Section 10(1) of the Act, such power is wide but has definite limitations in terms of the prescribed law. The Government would form an opinion as to relationship, and whether a dispute exists or is apprehended. This exercise of power is purely administrative in nature and must clearly be understood with definite distinction from a judicial or a quasi judicial power. Government cannot abrogate on to itself the power to adjudicate any question. The formation of opinion has to be prima facie based upon records before the Authority as well as the report submitted by the Conciliation Officer under Section 12 of the Act. An element of expeditious disposal and determination of industrial dispute is contemplated under various provisions of the Act and even in a case under Section 12(6) of the Act where the Conciliation Officer is required to submit a report within 15 days of the commencement of conciliation proceedings. For granting any extension of time there is a duty casted upon the Conciliation Officer to extend the period upon agreement between the parties appearing before the Conciliation Officer. There have been cases where the Courts have taken the view that a serious dispute with regard to relationship of employer and employee could not also be gone into by the appropriate Government in exercise of its powers under Section 10 of the Act and such matter requiring adjudication should be referred to the Labour

Court. With regard to the restricted scope of Section 10 of the Act, the consistent view of the Supreme Court has been that the Appropriate Government should exercise powers within the limited domain specified under the provisions of the Act and should not adjudicate matters which would otherwise fall within the domain of the Labour Court or Industrial Tribunal. Furthermore, the appropriate Government must state reasons for declining a reference, particularly where it declines reference, in furtherance to the demand raised by a workman. The material it considers should be germane to the dispute and not extraneous. A view has also been taken that a patently frivolous, perverse, vexatious, and a stale dispute, which does not remain to be an industrial dispute, could validly be declined by the appropriate Government. In this regard, amongst others, reference can be appropriately made to the judgment of the Supreme Court in the case of Bombay Union of Journalists (Supra).

33. The above decision illustratively places the development of Industrial Law in regard to concepts aforenoticed and clearly provides the precepts which could usefully be applied to different cases which may come up for determination before the Court. Analysis of the above decisions clearly show that the appropriate Government is vested with administrative power to make

or decline a reference. Such power is to be exercised in line with the law enunciated by the Court and essentially must not transgress its jurisdiction and travel into the matters of final determination which would squarely fall within the jurisdiction of the Labour Court or Tribunal. The expression 'It may at any time' does take the jurisdiction of the appropriate Government to make a reference beyond the restrictions of any limitation in terms of the period but still unexplained prolonged delay could prove fatal to the case of the workman either in terms of denial of reference or denial of backwages for entire or part of the period in question. The appropriate Government does not exercise its powers under the provisions of the Act as a mere administrative formality or a post-office. Application of mind for valid and appropriate reasons is the pre-requisite to denial or making a reference in terms of these provisions. The reasonableness in terms of period is sufficiently adopted under the scheme of this Act. On the one hand there is no specific limitation stipulated for raising a demand or making a reference but the proceedings of the authorities immediately preceding the reference as indicated in Section 12 of the Act and post proceedings or determination of the dispute again within the specified time under Section 10(2)(a) of the Act shows the legislative intent for adherence to the prescribed schedule of time and expeditious disposal of the industrial dispute. One of the irresistible

conclusion of the above discussion is that the concept of reasonable time has great application to objective implementation of various provisions of this Act. The unreasonable and unexplained delay may weigh with the authorities as well as with the Courts while dealing with the matters. Thus, it may not be quite correct to argue that Government would have no jurisdiction to decline reference of an industrial dispute, which has become stale and has extinguished because of unexplained prolonged delay. The time may not be of essence but certainly is a relevant factor to be taken into consideration by the appropriate Government at the appropriate stage.

34 The above enunciated principles and their objective appreciation in their correct perspective unambiguously demonstrate the guidelines for determining the issues which may arise before the Courts as well as the appropriate Government when it exercises its powers of reference under the provisions of Section 10(1)(c) of the Act. In addition to the five principles enumerated by the Full Bench in the case of Radhey Shyam (Supra), I would also refer to the following principles as well :

> "(a) The dispute is so belated or stale that direct consequence thereof is the extinguishment of the industrial dispute itself. Existence of the dispute being condition precedence to the reference, the power of the Government to decline a reference would not stand wiped out just because the provisions of the Section

> uses the expression 'at any time'.
>
> (b) The alleged dispute is so stale that it will be so prejudicial to either party to dispute that it would be unfair unjust to make a reference. Furthermore, it may not be possible for the Labour Court/Tribunal to mould the relief because of unexplained prolonged delay. While exercising its administrative power the Government must strictly confine itself within the domain of forming an opinion without travelling into the merits of the case and determination thereof. It must not usurp the power of the Tribunal. "

35 In the case of National Engineering Industries Ltd. v. State of Rajasthan and Ors., MANU/SC/0755/1999 the Supreme Court emphasised the scope of the powers and jurisdiction of the Industrial Tribunal vis-a-vis the power of the Government to make a reference. The Court held as under:

> " The Industrial Tribunal is the creation of a statute and it gets jurisdiction on the basis of reference. It cannot go into the question on validity of the reference. The question before the High Court was one of jurisdiction which it failed to consider. A tripartite settlement has been arrived at among the Management, the Labour Union and the Staff Union. When such a settlement is arrived at it is a package deal. In such a deal some demands may be left out. It is not that demands, which are left out, should be specifically mentioned in the settlement. It is not the contention of the Workers' Union that the tripartite settlement is in any way mala fide. It has been contended by the Workers' Union that the settlement was not arrived at during the conciliation proceedings under Section 12 of the Act and as such was not binding on the members of the Workers' Union. This contention is without any basis as the recitals to the tripartite settlement clearly show that the settlement was arrived at during the conciliation

proceedings."

36 Despite the fact that the provisions of the Industrial Disputes Act do not provide any limitation, it will always be appropriate for a workman to approach the concerned authorities for making a reference at the earliest opportunity. This would serve the dual purpose. Firstly, expeditious determination of a reference/case by the Competent Forum which is the object of the Act and, secondly, the employer or the concerned authority would not be able to take the plea of destruction/non-availability of record. Unexplained long delays as already noticed can be of some consequence particularly when the workman had taken no steps whatsoever to seek redress from the concerned authorities. Another Full Bench judgment of the Punjab & Haryana High Court in the case of Ram Chander Morya v. The State of Haryana and Ors., 1999(1) CLJ (C,Cr.& Rev.) 133 had also dealt with this concept at greater details and held as under:

> " 42. After taking into consideration the various provisions of law, stated above, and after taking into consideration the words "clearly belated" mentioned by the Supreme Court in Bombay Union of Journalists' case (supra), we would merely indicate that reasonable time in case of reference of an industrial dispute by an appropriate Government to the Labour Court or the

> Tribunal will be five yeas. In other words, if any industrial worker or union or any other person on behalf of the worker does not apply to the appropriate Government for reference of an industrial dispute under Section 10(1) of the Act to the Labour Court or the Tribunal for a period of five years and tenders no explanation for the delay beyond five years, this delay beyond the period of five years shall be taken as clearly belated."
>
> 43. We leave a note of caution here that if a worker or the union pleads / furnishes even a slightest explanation for delay in submitting his / its request to the appropriate Government for reference of his/its dispute to a Labour Court or the Industrial Tribunal then the appropriate Government shall leave the determination of the question o belatedness to the labour Court or the Industrial Tribunal. It will then be the province of the Labour Court or the Industrial Tribunal to decide the question of reasonable delay in filing the application after taking into consideration the relevant material placed before it. Now we come to the individual cases."

37. It is a social welfare legislation and, in view of the above enunciated principle of law essentially should receive an interpretation which would help in achieving the object of the statute that is protecting the workman against exploitation and prolonged litigation.

38. It will be appropriate to conclude that the dimensions of the powers vested in the appropriate Government under Section 10(1)(c) of the Act are wide which require proper application of mind in consonance with the above enunciated principles but in no way the appropriate Government could usurp

or abdicate to itself the powers of determination which are exclusively vested in the Labour Court/Tribunal. Long delays by itself may not be sufficient to deny the reference requested for by the workman unless it is so seriously prejudicial to the other party as to permit the workman to take undue advantage of his own conduct or the dispute is so belated and stale that in the eyes of law it has extinguished or lost its substance.

39 In support of its contention that there existed no industrial dispute at the time of reference, the petitioner referred to the receipt dated 15th December 1998 executed in favour of M/s Sadanand Caterers allegedly by the workmen stating that they had received a sum of Rs.2910/- being retrenchment compensation and notice pay. Firstly, this receipt does not say that it is in full and final settlement of all claims of the workmen. Secondly, the order passed by the appropriate authority on the complaints of the workmen, it was directed that the compensation be returned by the workmen to the employer and it had also accepted the plea that the contractor's agreement with the petitioner company deserves to be looked into. It is interesting to note that the Conciliation Officer in the proceedings recorded by him on 14th December 2005 had noticed that the management had taken up a plea that the workmen were the employees of the contractor and they

cannot claim reinstatement in the company. He specifically noted that “the workmen accordingly have impleaded the contractor as a party to this proceedings and due notice was sent to the contractor regarding this proceedings but nobody on behalf of the contractor appeared before the undersigned. The demand of the workmen for reinstatement with continuity of service and all back wages was admitted in conciliation on 10.8.2005 and the demand notices were duly served on the concerned parties. Since the management has denied the employee-employer relationship between them and the workmen chances of amicably settling the dispute were remote and therefore the conciliation proceedings were concluded in failure and failure was recorded on 1.9.2005”.

40. The above pleadings clearly show that there existed a substantial dispute between the parties which prima facie satisfying the requirements of section 10 read with section 2(k) of the Act and the said dispute was incapable of being finally decided, without proper legal adjudication process.

41. Section 2 (k) defines an ' industrial dispute' which means any dispute or difference between employers and employers, between an

employer and a workman or a dispute which is connected with the employment or non-employment or the terms of employment or with the conditions of labour of any person. This reflects the scope of this definition to be so wide and to give an interpretation of a restricted nature to such a definition would be contrary to the legislative intent. The language 'any matter relating to the conditions of service of any person' also suggests that a person employed in an industrial organisation at any point of time should be in a position to raise a dispute within the meaning of the Act. It could also be noticed that the purpose of such a labour welfare legislation is that the 'workman' , as a class, should not be exposed to the prolonged and legal complexities of the normal civil litigations. They have been, thus, placed under the specialised class of persons for whose welfare the legislation has been enacted, would be assumably applied to their advantage and welfare. The 'dispute' has to be one which is covered within the definition of Section 2 (k), but what would be the nature of the dispute is not the determinative factor. The matters which will fall within the domain of the appropriate government would have a limited scope while the jurisdiction of the Labour Court to determine principal and all ancillary issues is sufficiently spelled out in those provisions. Even in common parlance, the expression ' dispute' connotes a controversy, a quarrel, even a disagreement between the

management and the employee or any dispute which is capable of giving rise to an industrial action within the scope of Section 2 (k) of the Act. It can hardly be contended that the dispute involved in the present petition would not be covered under this definition. The parties have been litigating before different forums either in relation to determination, closure, entitlement of wages and/or even reinstatement. All these matters were seriously contested by the parties to the lis including the petitioner-company. The Supreme Court in the case of Gujarat Electricity Board, Thermal Power Station vs. Hind Mazdoor Sabha AIR 1995 Supreme Court 1893 held that if the contract is a sham one and not genuine, the workman of the so called contractor can raise an industrial dispute for declaring that they were always the employees of the principal employer and further for claiming appropriate relief in terms of their service conditions. Such a dispute would be an industrial dispute and would invariably be raised by the direct employees of the principal employer.

42 The Supreme Court in the case of D.N. Banerji vs. P.R. Mukherjee and others AIR 1952 Supreme Court 58 (Vol. 40, C.N. 16) while explaining the term 'industrial dispute' held as under:-

> "....The wider import is attracted even more clearly when we look at the latter part of the definition which refer to "calling, service, employment, or industrial occupation of avocation of workmen." "Undertaking" in the first part of the definition and "industrial occupation or avocation" in the second part obviously means much more than what is ordinarily understood by trade or business. The definition was apparently intended to include within its scope what might not strictly be called a trade or business venture."

43. A similar view had also been taken in the case of The Secretary, Madras Gymkhana Club Employees' Union vs. The Management of the Gymkhana Club AIR 1968 Supreme Court 554 (V 55 C 118)

44. Further in the case of Shambu Nath Goyalvs.Bank of Baroda AIR 1978 Supreme Court 1088 the Supreme Court held as under:-

> "The Act nowhere contemplates that the Dispute would come into existence in any particular, specific or prescribed manner. For coming into existence of an industrial dispute a written demand is not a sine qua non, unless of course in the case of public utility service. The key words in the definition of industrial dispute in S.2 (k) are 'dispute or difference'. The term 'industrial dispute' connotes a real and substantial difference having some element or persistency and continuity till resolved and likely if not adjusted to endanger the

> industrial peace of the undertaking or the community. When parties are at variance and the dispute or difference is connected with the employment, or non-employment or with the conditions of labour there comes into existence an industrial dispute. To read into definition the requirement of written demand for bringing into existence an industrial dispute would tantamount to re-writing the section.
>
> The power conferred by S.10(1) on the Government to refer the dispute can be exercised not only where an industrial dispute exists but when it is also apprehended. From the material placed before the Government, Government reaches an administrative decision whether there exists an industrial dispute or an industrial dispute is apprehended and in either event it can exercise its power under S.10 (1). The Court cannot canvass the order of reference closely to see if there was any material before the Government to support its conclusion, as if it was a judicial or quasi judicial determination. No doubt it will be open to a party seeking to impugn the resulting award to show that what was referred by the Government was not an industrial dispute within the meaning of the Act, and that, therefore, the Tribunal had no jurisdiction to make the award."

45 The nature of the present dispute raised and referred to is such that it would squarely fall within the scope of the expression 'industrial dispute' . The dispute, though singular in its reference, essentially takes within its ambit the pleas which the parties would raise before the Industrial Tribunal falling within the scope and ambit of the order of reference

46 The learned counsel appearing for the petitioner heavily relied upon the judgment of the Supreme Court in the case of National Engineering Industries Limited vs State of Rajasthan and ors, AIR 2000 SC 469 to contend that the High Court has jurisdiction to entertain the writ petition when there is allegation that there is no industrial dispute and none apprehended which could be subject matter of reference for adjudication under section 10 of the Act. An industrial dispute has to be in existence at the time of making a reference.

47. This judgment of the Supreme Court would hardly place the case of the petitioner on any better footing. There can be no dispute to the principle of law enunciated in the judgment that settlement has to be preferred over adjudication and that a writ could lie wherever no industrial dispute was in existence at the time of making the reference. The facts of the present case clearly reflect that there was not only mere apprehended dispute but there existed an actual dispute which has been the bone of contention between the parties in different proceedings and over a prolonged period of time the workmen had been asserting their right of absorption as well as wrongful termination and that there was sham and camouflage transaction

between the company and the contractor being intended to frustrate their claim. This of course was denied by the petitioner company. According to them the company had closed its unit with leave and paid retrenchment compensation to the workmen and as such no dispute existed. This was the controversial bone of the contention between the parties and in view of the fact that failure report was submitted by the Conciliation Officer on 14th December 2005, adjudication by the proper forum was inevitable. The learned counsel for the petitioner also placed reliance upon another judgment of the Supreme court in the case of The Secretary, Indian Tea Association vs Ajit Kumar Barat and ors, 2000(84) FLR 984 in support of his argument that the Government has to form an opinion whether an employees are workmen and thereafter has to consider whether an industrial dispute exist or is apprehended. We have already discussed the law in this regard at great length. At the cost of repetition we may notice that these are unquestionable propositions of law. It is only their application to the facts of a given case that would resolve the controversy. The Government has formed an opinion and has made a reference satisfying itself that there is an industrial dispute in existence between the parties. Of course formation of such an opinion can be examined by the court under Article 226 of the Constitution but it certainly falls within the very limited ambit. The court

cannot sit as a court of appeal or appellate authority to examine excess of jurisdiction of the appropriate Government. Unless and until the opinion is apparently without jurisdiction, in excess of jurisdiction or is based on no material as also inter alia do not satisfy the ingredients of section 10 of the Act, the court would be very reluctant to interfere in such a reference. The Legislature in its wisdom has provided special forum for settlement of an industrial dispute which is expected to be expedient and any attempt to throttle such a proceedings at the threshold has to be examined with great caution. On the one hand the petitioner company itself questioned the legality of the orders passed by the appropriate authority/forums on the complaints of the workmen in writ petitions and certain observations have come in those orders/judgments that the respondent-workmen were part and parcel of the frame work of the workmen of the petitioner company. Even if they were employed by the contractor as alleged by the company, still the labour court would have to examine the contentions of the workmen that the contract is sham and a camouflage to frustrate the legitimate claim of the workmen. The Government was obviously not competent to go into these niceties of law and evidence and then write a judgment. Such an approach would be an apparent contradiction to the concept of formation of an opinion, which is to be based on prima facie material. From the history of this case,

right from the talks from the year 2002, when the company took a decision to declare closure under section 25(O) of the Act and thereafter the parties have been in continuous litigation before one authority or the other forum or court, we are really unable to appreciate the contention of the petitioner that there exists no prima facie case for reference to the industrial court. The parties are neither strangers to each other nor there is any conclusive findings recorded which has attained finality between the parties, answering the query whether there exists or not, relationship of employer-employee between the parties. This question itself has to be adjudicated upon though there is more than prima facie material before the appropriate Government to form an opinion for making a reference within the provisions of section 10 of the Act.

48 Equally ill founded is the reliance placed by the learned counsel for the petitioner upon a judgment in the case of Nedungadi Bank Ltd vs. K.P. Madhavankutty and ors, 2000(l) LLJ 561 and Reserve Bank of India vs Gopinath Sharma and anr, (2006) 6 SCC 221 to press the plea of delay and laches. In the present case if there is any delay it is on the part of the petitioner company. The workmen sincerely facing the prolonged litigation right from the year 2003 and some of the orders were passed in their favour

while such orders were set aside by the High Court. The order of reference was made on 20th July 2006. The petitioner company in fact accepted the said order and participated in the proceedings before the labour court. They filed their reply to the statement of claim of the workmen, of course taking various objections. The parties have filed documents and now the reference is listed for recording evidence before that court. The petitioner company itself has acquiesced in the proceedings and has taken considerable time to file the present petition, which itself was instituted on 27th February 2007. There is no reasonable or proper explanation as to why the company has filed the present petition after such delay, particularly when the contention is that the action of the Government was in excess of jurisdiction vested in it under the provisions of section 10 of the Act.

49. In the order passed in Complaint Nos 750 of 1997 and 622 of 1998 a definite direction was given to the petitioner company to regularize the services of the respondent-workmen at its head office and also pay them difference of wages besides restraining them from passing transfer orders and termination orders in case of the respondent- workmen. This entire proceedings would constitute more than sufficient material for expressing prima facie opinion in relation to the existence of an industrial dispute and for its appropriate reference to the court of competent jurisdiction. The record of

the present petition clearly shows that there was persistent dispute between the workmen and the employer. The question in regard to the transaction being sham or otherwise has also been raised. If this court were to examine, all these questions of fact, which require proof by documentary or oral evidence, in our opinion, the court would exceed its jurisdiction under Article 226 of the Constitution of India and would practically answer the references, which have been made to the labour court in accordance with the provisions of the special statute.

50. We may notice that in the case of Subhash Chand (supra), the court in fact had observed that the appropriate Government could not require the parties to produce documentary or oral evidence to satisfy the ingredients of section 10. The Government has to form an opinion, prima facie, in regard to the contents and essentials indicated in that judgment. Finding that prima facie there was material before the appropriate Government to consider the case, the Government was directed to consider the case of the workmen and make a reference in accordance with law.

51. In view of the above reasoning, we are unable to find any merit in the submissions made on behalf of the petitioner company and we have no hesitation in dismissing the petition. We make it clear that the labour court is

expected to deal with all the contentions raised by the parties before it in accordance with law. Writ petition is accordingly disposed of, leaving the parties to bear their own costs.

CHIEF JUSTICE

S.R.SATHE, J.